IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. RICKIE J. STALLINGS

Appeal from the Circuit Court for Sevier County
No. CR9320 Richard R. Vance, Judge

No. E2005-00239-CCA-R3-CD - Filed July 26, 2006

The defendant, Rickie J. Stallings, is serving an effective incarcerative sentence of 18 years in connection with his Sevier County convictions for attempted aggravated arson, aggravated assault, assault, and possession of explosive components. *See* Tenn. Code Ann. §§ 39-12-101, -14-302, -2-101, -13-101, -14-702 (2003). On appeal, the defendant asserts (1) that the evidence is legally insufficient to support his convictions, (2) that the trial court committed reversible error in admitting evidence seized from within the curtilage of his residence, (3) that he was denied a fair trial because the trial court failed to declare a mistrial during the state's case-in-chief, (4) that the trial court committed plain error in admitting testimony regarding the condition of an automobile parked at his residence, (5) that his right to a unanimous verdict was compromised when the trial court failed to supplement its jury instructions relative to unanimity, (6) that his sentence is excessive, and (7) that the cumulative effect of the trial court's errors deprived him of a fair trial. After thoroughly reviewing the record, briefs of the parties, and applicable authorities, we find that the evidence was sufficient to support the convictions, that any error in the admission or exclusion of evidence at trial was harmless and/or did not rise to the level of plain error, that any instructional error did not constitute plain error, and no cumulative error deprived the defendant of a fair trial. Finding, however, error in the application of various enhancing factors, we modify the defendant's effective sentence from 18 to 16 years.

Tenn. R. App. P. 3; Judgments of the Circuit Court are Affirmed as Modified.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., joined. GARY R. WADE, P.J., not participating.

John E. Eldridge and Robert Kurtz, Knoxville, Tennessee (at trial); and G. Scott Green (on appeal), for the Appellant, Rickie J. Stallings.

Paul G. Summers, Attorney General & Reporter; Blind Akrawi, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Steven R. Hawkins and Nichole Bass, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

A senseless altercation on July 28, 2002, outside the Pigeon Forge residence of Joyce Lane-Smith gives rise to this appeal.

Viewed in the light most favorable to the state, the proof at trial showed that in July 2002, Joyce Lane-Smith lived in a mobile home residence at 2565 Ridge Road in Sevier County. She was divorced and helping to raise her two teenage daughters. Ms. Lane-Smith testified that she and the defendant had dated for approximately seven years, three of which they lived together in Jefferson City. She ended their relationship in July 2001, but the defendant periodically contacted her. He once came to her trailer uninvited but departed, without incident, after Ms. Lane-Smith told him to leave.

On the afternoon of July 28, 2002, Ms. Lane-Smith answered her telephone, and the defendant told her that he had sold his Jefferson City residence and was moving to Florida. She offered "best wishes" and asked the defendant if he was going to replace her daughter's antique mirror that he had broken. Ms. Lane-Smith testified that her question prompted the defendant to go "ballistic," whereupon she told the defendant that she did not have time to speak to him and hung up the telephone. The defendant called her a second time and said that he was going to sue her regarding money she had withdrawn from the bank when she ended the relationship, and at one point that day, the defendant even called her mother.

At the time of the telephone calls, Ms. Lane-Smith was living with Chris Smith, whom she later married. Mr. Smith's elderly father was visiting with them that weekend. After learning that the defendant had spoken with her mother, Ms. Lane-Smith contacted the defendant and demanded that he have no further contact with her or her parents. During that telephone call, Mr. Smith picked up an extension telephone and listened until the defendant said in a "threatening manner" that he knew where Mr. Smith's mother lived. Mr. Smith interrupted and advised that if the defendant "messed with his mama" that Mr. Smith would kill the defendant. After the defendant insisted that they meet "to settle this like men," Mr. Smith hung up the extension telephone. Ms. Lane-Smith testified that her telephone was still connected, and when the defendant realized that she was listening, he questioned her multiple times, "Are you ready to die?" Ms. Lane-Smith ended the telephone connection, but the defendant called back wanting to know if Mr. Smith was going to meet him. Ms. Lane-Smith hung up the telephone receiver without speaking.

Ms. Lane-Smith said that the rest of the day was uneventful until early evening. Mr. Smith's father had gone to bed, Ms. Lane-Smith was inside talking to a friend on the telephone, and Mr. Smith was sitting outside on the porch. Suddenly, Mr. Smith ran into the residence, obtained a gun, and ran outside. Ms. Lane-Smith immediately hung up the telephone, turned on the porch light, and called E911. She reported that someone was outside the trailer, and she could hear a physical confrontation underway. Ms. Lane-Smith testified that she did not see the intruder, and she was too scared to go outside. When the confrontation subsided, she opened the door; Mr. Smith was standing in her view "soaking wet with what smelled like gasoline [or] kerosene." Mr. Smith was

wearing short pants, and Ms. Lane-Smith observed that his knees were "all torn up" from fighting and falling on gravel. The police arrived moments later and interviewed the couple. Ms. Lane-Smith supplied the defendant's address to the officers.

On cross-examination, the defense sought to attack Ms. Lane-Smith's credibility and to establish a motive and means for accusing the defendant. Ms. Lane-Smith agreed that the defendant injured his back while they were together, but she maintained that he could "still do just about anything he tried to do." She also knew that at some point the defendant had a store and was in business selling NASCAR memorabilia, such as hats and shirts. When the business closed, the defendant kept the unsold merchandise, and Ms. Lane-Smith acknowledged that she had access to the items. She denied, however, taking any memorabilia when the relationship terminated in July 2001. Also, she agreed that the defendant did not want their relationship to end. She and the defendant spoke several times afterwards, and according to Ms. Lane-Smith, the conversations concerned the defendant's residence, which had been titled jointly in their names.

The defense inquired whether Ms. Lane-Smith ever told the defendant not to call her on weekends when Mr. Smith was off work. She never answered the question; instead, she testified that the defendant was "all the time calling" and that she told him not to call. Ms. Lane-Smith conceded that she "ran into" the defendant at his place of employment. She denied going to the job site early to wait for the defendant to arrive. Also, she specifically denied ever asking the defendant to meet her at a Burger King restaurant.

Ms. Lane-Smith denied telling the defendant that she and Mr. Smith were living "week to week." She also denied trying to get money from the defendant, although she admitted that when she moved and left the defendant she wrote herself a check for $7,000 from their joint account; she claimed the check was a reimbursement for monies she had invested in the residence, but she did not discuss the matter with the defendant.

Ms. Lane-Smith testified that Mr. Smith was aware that she and the defendant were in communication. She said that Mr. Smith was understanding because the conversations concerned her former residence. In the early morning hours of July 28, 2002, Ms. Lane-Smith tried unsuccessfully to reach the defendant's parents. She explained the reason as wanting to ask the defendant's father to tell the defendant to stop calling her. Regarding the telephone calls later in the day, Ms. Lane-Smith testified that when Mr. Smith and his father returned to the trailer, she was visibly upset, which upset Mr. Smith. Because she was upset, she asked Mr. Smith to pick up the extension telephone when the defendant again called. Ms. Lane-Smith could not account for the source of the defendant's knowledge of the whereabouts of Mr. Smith's parents. She denied being the source, and she denied that the defendant was trying to inform Mr. Smith that she had been "seeing" the defendant.

The defense established that Ms. Lane-Smith saw Mr. Smith come into the trailer, go to the bedroom, and then depart with a gun in the back of his pants. She and Mr. Smith did not speak to each other at the time. Without communicating with Mr. Smith, she terminated her

telephone conversation and called the police. Ms. Lane-Smith first testified that she placed the emergency call "[a]s soon as [she] heard the side of [her] trailer coming down." She next testified that she placed the call moments after Mr. Smith walked out the trailer door and that she "may have" placed the call even before hearing any commotion.

Ms. Lane-Smith insisted that she "knew" the defendant was the person who came to the trailer, even though she did not see him and did not ask Mr. Smith who assaulted him. When the police officers arrived, they placed Mr. Smith in handcuffs and separated him from Ms. Lane-Smith. The officers directed her to go inside the trailer, and one of the officers asked her if she had a picture of the defendant. Ms. Lane-Smith said that she retrieved a photograph, which the officer handed to Mr. Smith and asked if the defendant was in the photograph.

Chris Smith testified for the state that he and his wife were married August 19, 2002. In July of that year, he was living with Ms. Lane-Smith, and at that time, he did not personally know the defendant and had not seen the defendant in person. However, he knew of the defendant based on what Ms. Lane-Smith had told him, and Mr. Smith had seen pictures of the defendant.

Mr. Smith confirmed that his father was elderly and in poor health and required constant oxygen. He and his father had taken a drive on July 28, 2002, and had returned to the trailer in the late afternoon. Ms. Lane-Smith told him about the telephone calls, and Mr. Smith said that he told her "just blow it off." He was standing in the living room when the defendant again called, and Ms. Lane-Smith told him to pick up the extension. When he did so, he heard the defendant comment, in a threatening manner, that the defendant knew where Mr. Smith's mother lived. At that point, Mr. Smith interrupted and told the defendant "if he messed with [his] mother, [he'd] kill him." The defendant said, "Let me make sure I get this," and Mr. Smith repeated what he had said and hung up the telephone. After a short time, Ms. Lane-Smith also ended the call and told him that the defendant kept repeating, "Are you ready to die?"

After an early evening of yard work, Mr. Smith sat with his father on the porch, and each drank one beer. Mr. Smith then assisted his father in retiring for the night and returned to the porch to relax. Mr. Smith testified that it was dusk when he heard "gravels rustling around . . . at the end of the trailer." Mr. Smith became suspicious, went inside where he retrieved a handgun and a hunting knife, and returned outside. He maintained that he said nothing to Ms. Lane-Smith because he did not want to alarm her. Mr. Smith walked toward the end of the trailer where he had parked his truck and boat, and when he reached the front of the truck, the defendant "stepped out from behind the trailer." Mr. Smith testified that when he asked, "What do you think you're doing back here," the defendant claimed he had come over from "1A" to borrow gasoline. Mr. Smith challenged that explanation, said, "You're Rick," grabbed the defendant's shirt with his left hand, and stuck the handgun in his right hand to the defendant's chest. The defendant struck Mr. Smith with a jug containing what smelled like kerosene; the liquid doused Mr. Smith. Mr. Smith grabbed the defendant and began dragging him toward the front of the trailer. The defendant was swinging and fighting, and the men were hitting against the trailer as they moved. When they reached the front of the trailer, Mr. Smith shouted for Ms. Lane-Smith, and the men continued hitting each other. Mr.

Smith managed to sling the defendant into a shallow ditch, but the defendant rose and headed to nearby apartments.

Mr. Smith testified that he caught up with the defendant at the apartments and saw him approach a vehicle. Mr. Smith became afraid, stopped his pursuit, and returned to the trailer. Mr. Smith described the vehicle as a mid-size, American-made sedan painted white, cream, or possibly silver. He did not move close enough to read the tag number on the car, but he did see the defendant get in the vehicle and leave. Upon returning to the trailer, Ms. Lane-Smith advised that police officers were en route, and Mr. Smith then told her what had happened and identified the defendant as the assailant. Mr. Smith said that he was able to identify the defendant based on pictures he had seen before.

Mr. Smith went outside the trailer to meet the officers; he still had the gun in his hand. When the officers arrived, they directed Mr. Smith to put down the weapon, and they handcuffed him. However, once Mr. Smith explained what had happened, he was released. One of the officers asked if he could identify the assailant, and Mr. Smith affirmed that he could. The officer obtained a photograph and showed it to Mr. Smith; Mr. Smith confirmed the person in the photograph was the assailant. Mr. Smith recalled that the defendant had been wearing a baseball cap, and Mr. Smith found the cap at the end of the trailer where the fight began. Mr. Smith was wearing shorts that evening, and his knees and hands were injured when he fell on the gravel driveway during the fight.

On cross-examination, Mr. Smith testified that the July weather was so warm that he was wearing only shorts and shoes. He had, however, described the assailant as dressed in a long sleeved black sweatshirt and ball cap and as having a "goatee." The ditch into which Mr. Smith threw the intruder contained some water and mud, and after climbing out of the ditch the intruder departed. The defense attacked Mr. Smith's identification of the defendant based on a photograph by his earlier sworn testimony that on the day of the assault, he did not know the defendant by sight and that he only had a "good feeling as to who it was."

Mr. Smith testified that the lighting around the apartments was good and that he was close enough to see the automobile in which the assailant departed. He had described the vehicle as a light-colored, mid-size sedan. Also, previously, Mr. Smith had testified that the vehicle appeared to have four doors. Mr. Smith denied drinking more than one beer that evening and claimed no knowledge that one of the officers was concerned about his state of sobriety. Previously, Mr. Smith had testified he was uncertain how many beers he drank but he "guess[ed] two, maybe."

Mr. Smith testified that he was unaccustomed to walking around outside the trailer armed with a gun and knife. He could think of no other time that he was so armed. Mr. Smith did not tell the intruder to "stop" and did not advise that he would "shoot." Rather, Mr. Smith walked up to the man and asked what he was doing; Mr. Smith had the pistol in his hand and had his finger on the trigger. Mr. Smith agreed that he used his left hand and grabbed the front of the man's sweatshirt and stuck the gun up to the man's chest. The man was carrying a milk jug in his right

hand, and he swung it into Mr. Smith's shoulder and head area. The contents "splattered" on both men. Mr. Smith did not fire his gun or pull out his knife; he continued to grasp the man's sweatshirt, and he began striking the assailant multiple times in the head with the gun. Mr. Smith released the sweatshirt when he threw the man into the ditch. Mr. Smith explained that the only time he was injured occurred when both men fell to the gravel.

Randal Nelson, a forensic scientist with the Tennessee Bureau of Investigation Crime Laboratory in Nashville, testified as an expert regarding examinations he performed. Pigeon Forge Officer Wayne Knight submitted to his department a cigarette lighter discovered in the Smiths' driveway, and Officer Knight asked that the item be checked for latent prints. One of Agent Nelson's examiners performed the necessary tests, which failed to reveal the presence of latent prints. In addition, Agent Nelson received a milk jug and a liquid sample that were submitted for ignitable liquid residue analysis. His analysis revealed the presence of two, distinguishable distillates, gasoline and kerosene. A black cap and Mr. Smith's shorts, which were submitted for analysis, tested positive for kerosene range distillate. Samples from the passenger door panel and passenger window of a Thunderbird automobile tested negative for the presence of any ignitable liquid residue. A white rag from the passenger floorboard tested positive for the presence of some chemical that could not be identified, and two passenger floor mats contained kerosene range distillate.

On cross-examination, Agent Nelson testified that the accelerants in this case are typically produced in a refinery from crude oil. There are hundreds of such distillates found in household and industrial use. Some of the distillates are classified as light petroleum, such as lighter fluids and rubber cement. Medium petroleum distillates include paint thinner, torch fuels, and some charcoal starters. Heavy petroleum distillates include diesel fuel and fuel oil, and gasoline is in another classification. A fifth classification, kerosene, includes a large number of products, such as jet fuel, torch fuels, paint thinners, some solvents, some insecticides, lamp oils, and some polishes. Regarding his analysis in this case, Agent Nelson testified that he was able to classify a sample into a particular category but could not more specifically identify the substance.

On redirect examination, Agent Nelson explained that his testing is not quantitative; therefore, he could not determine how much kerosene or how much gasoline was in the milk jug. Likewise, Agent Nelson could not determine if the kerosene found on the shorts and cap could have come from the milk jug.

Pigeon Forge Police Officer Randall Smith testified that he responded to a call for assistance on July 28, 2002, at the residence of Ms. Lane-Smith, who had reported a fight in progress involving a handgun. He knew Ms. Lane-Smith, and he arrived at her residence at 9:49 p.m. He encountered Mr. Smith who was standing on the front porch, arms stretched up and holding a gun in one hand. Mr. Smith announced that he had a gun, and Officer Smith followed standard procedure by pulling his firearm and ordering Mr. Smith to put down his gun. When Mr. Smith complied, Officer Smith approached and placed handcuffs on Mr. Smith. Once Mr. Smith was

secured, Officer Smith inquired what had happened and then released Mr. Smith. Officer Smith testified that Mr. Smith was not intoxicated.

Mr. Smith identified the defendant as the assailant and described the defendant's vehicle as a light-colored sedan. Ms. Lane-Smith advised Officer Smith about the earlier telephone calls from the defendant, provided a photograph of the defendant to the officer, and provided the telephone number and address of the defendant's residence. Other officers investigated the crime scene outside the trailer, and after Officer Smith finished his interviews, he drove to the police department. Officer Smith telephoned Jefferson City Officer Allen Kelly, who was his brother-in-law, and asked Officer Kelly to drive by the defendant's residence and report any vehicles in the area that resembled a light-colored sedan. Officer Smith then drove to the Sevier County Sheriff's Department to obtain warrants. Officer Kelly called and reported a vehicle tag number, and Officer Smith asked him to attempt to contact the defendant. Officer Kelly was unsuccessful, and he reported back to Officer Smith that no one would answer the door at the residence.

Officer Smith placed a telephone call to the defendant's residence, spoke with Sherry French, and told her that officers would be coming to the home to speak with the defendant. After the defendant was arrested, Officer Kelly transported the defendant to Officer Smith's location, and Officer Smith drove the defendant to the Pigeon Forge station for processing and to the Sevier County jail for detention.

On cross-examination, the defense reviewed various segments of Officer Smith's incident report. In one place, Officer Smith wrote that Mr. Smith had "walked around behind the house where he found [the defendant] pouring a liquid accelerant on [the] mobile home." Officer Smith agreed that Mr. Smith's trial testimony was different on that point. In another place in the incident report, Officer Smith wrote that Mr. Smith identified the vehicle as a "white sedan of unknown make or model." Officer Smith claimed that Mr. Smith actually described the vehicle as "light-colored" but probably white; therefore, Officer Smith wrote "white" in his report.

Wayne Knight, the evidence technician for the Pigeon Forge Police Department, testified that his duties included "process[ing] the [crime] scene, collect[ing] and packag[ing] the evidence." He was assigned to the crime scene investigation at the Ridge Road trailer on July 28, 2002. Officer Knight took photographs of the scene and identified them at trial. Among the items photographed were a half-gallon milk jug, a black cap, a white rag, and a red cigarette lighter; those items were found on the ground at the rear area of the trailer. Officer Knight also found and photographed a black top from a cigarette lighter, which was separate from the lighter itself.

Officer Knight testified that a strong kerosene-type odor emanated from the rear of the trailer where a liquid had spilled from the jug onto the ground. Officer Knight also noticed that some of the liquid had splashed on the trailer and the side of Mr. Smith's truck. Officer Knight identified and itemized each item that he collected and sent to the TBI crime laboratory for analysis.

After completing his investigation at the trailer, Officer Knight traveled to the defendant's residence in Jefferson City and "processed" an automobile owned by the mother of the defendant's girlfriend. Officer Knight earlier had located the owner, Geraldine Yarborough, at her residence in Kodak and obtained her written consent to search the automobile. The vehicle, a light blue Ford Thunderbird, was parked in the driveway of the defendant's residence. Officer Knight said that both vehicle doors were open, and a candle was sitting in the rear floorboard area. On the passenger's side of the car, Officer Knight smelled a kerosene odor, and he detected an oily residue on the passenger side door and window. Officer Knight photographed the vehicle and collected samples from the interior, including two floor mats and a white rag. Officer Knight said that the vehicle interior did not appear to have been cleaned recently because the floorboard contained grass.

On cross-examination, Officer Knight admitted that the jug found at the trailer scene could have contained fingerprints but that he did not request a fingerprint analysis by the TBI crime laboratory. Similarly, the officer did not attempt to determine if the vehicle at the defendant's residence had any latent fingerprints, and he did not collect or preserve the candle found inside the vehicle. Moreover, the officer did not submit the cap found at the trailer scene for hair analysis. Officer Knight recalled other officers at the trailer scene explained to him that a fight had occurred, but he was uncertain if he was told that the assailant had been thrown in the ditch near the trailer. Officer Knight did not check but was willing to assume that the ditch was muddy. He did not, however, find any mud inside the vehicle at the defendant's residence.

Jefferson City Police Officer Allen Kelly testified that Officer Smith called him at approximately midnight July 28 and requested that Officer Kelly drive to a specific residence on George Avenue and look for a light-colored sedan. Officer Kelly said that he "spotted a vehicle that matched the description," copied down the tag number, and provided the information to Officer Smith. Officer Smith then asked Officer Kelly to determine if anyone was at the residence. Officer Kelly and Officers Potts and Winstead knocked on the front entrance and a window. Receiving no answer, Officer Kelly walked to the back door, where he noticed lights turned on, and knocked. Receiving no response, Officer Kelly testified that he left through the driveway at which time he noticed that the vehicle's passenger side window was rolled down approximately two inches. Officer Kelly said that he "kind of leaned over and shined [his] light in it, and [he] could smell what [he] thought was gasoline or kerosene type smell."

Officer Kelly relayed his discovery to Officer Smith, whereupon Officer Smith sent by facsimile machine copies of warrants for the defendant's arrest. Officer Kelly and his companions again approached the residence and knocked on the front door. The defendant answered the door and permitted the officers to enter the residence. The defendant was dressed in a robe, and the officers instructed him to change clothing. As they were leaving, Officer Kelly picked up the defendant's wallet from the living room coffee table and noticed that the wallet was wet. The defendant told Officer Kelly that Sherry French, the defendant's girlfriend who was present at the residence, had accidently "washed it." Ms. French retrieved a "# 28NASCAR" hat for the defendant to wear, and the men left and transported the defendant to the police station for "booking." Officer

Winstead returned to the residence to meet the crime technician. At that point, Officer Winstead noticed that the vehicle doors were open.

On cross-examination, Officer Kelly agreed that the defendant made no complaints of any injuries when arrested at his house, and Officer Kelly did not observe any injuries. The officer also agreed that the defendant's wallet was very wet "through and through."

Officer Scott Winstead testified and confirmed that he accompanied Officer Kelly to the defendant's residence. Officer Winstead said that doors on the vehicle at the residence were closed the first time when the officer received no response to their knocking. Officer Winstead recalled leaving the scene and returning to the police department to receive arrest-warrant facsimiles from Officer Smith. Thereafter, Officer Winstead returned to the defendant's residence, and the officer again observed that the car doors were closed and that the vehicle's interior was dark. After the defendant was arrested, Officer Winstead again drove to the police department where he was instructed to return a third time to the residence to meet the crime technician. En route to the residence, Officer Winstead was diverted for a few minutes to tend to another law enforcement task, after which he proceeded to the defendant's residence and arrived after 1:00 a.m. On that occasion, Officer Winstead noticed that the vehicle's dome light was on, and the car doors were open. He testified, "There was nobody around the vehicle. I jumped the fence, because it was locked . . . with a chain. And I jumped the fence and walked and shined my flashlight into the car." Officer Winstead said he smelled both a strong, deodorizer-type odor and a gasoline odor and saw a candle in the back floorboard.

At the conclusion of Officer Winstead's testimony, the state rested its case. The defendant took the stand and testified that he was 41-years old and employed full time as an independent contractor for a trucking company. His living relatives included his parents who resided in Sevierville, his son who resided in Pigeon Forge, and his niece and nephew who resided in Powell.

The defendant described his long-standing relationship with Joyce Lane-Smith that ended in July 2001, and he testified about previously owning a NASCAR store that sold racing memorabilia. When the business closed, the defendant kept the remaining inventory, which included numerous hats. Because the defendant and Ms. Lane-Smith were living together at the time, she had access to the merchandise. Even after their relationship ended, the defendant had affection for Ms. Lane-Smith and helped her move into her trailer.

The defendant explained that beginning in April 2002 and into the middle of June, he received telephone calls from Ms. Lane-Smith approximately three times a week. She typically called after 5:00 p.m. and avoided calling on the weekends. During the conversations, Ms. Lane-Smith complained that she was unhappy being with Mr. Smith and that they were "barely making ends meet." On occasion, Ms. Lane-Smith would ask the defendant for money, but he declined her requests. At times, Ms. Lane-Smith called the defendant in the evening and arranged to meet him the next morning near his place of employment before he went to work. The defendant recalled that

Ms. Lane-Smith also came by his place of employment twice in the afternoon, and once she invited him to meet her at Burger King in Pigeon Forge. At the Burger King meeting, Ms. Lane-Smith spoke about her children visiting with Mr. Smith's parents, and from that conversation, the defendant learned where Mr. Smith's parents lived.

The defendant admitted calling Ms. Lane-Smith on the evening of July 28. He testified that he wanted to tell her about a job offer he received. The offer involved moving to Florida, and the defendant wanted to know if Ms. Lane-Smith was interested in reconciling and moving with him. Ms. Lane-Smith replied that she "could not talk now" and terminated the call. The defendant called a second time, and Ms. Lane-Smith again said that she could not talk at that time. Later in the evening, the defendant called a third time, and while he was talking about the move to Florida, Mr. Smith picked up the telephone. The defendant testified that Mr. Smith "started cussing" and was "very belligerent." According to the defendant, Mr. Smith "said his piece and hung up . . . [and] didn't give me a chance to say nothing." Thereafter, Ms. Lane-Smith called the defendant to report her decision to stay with Mr. Smith, and Mr. Smith picked up the telephone and again began cursing. Mr. Smith also threatened the defendant, "If you mess with my momma, I'll kill you, you SOB." Mr. Smith hung up the telephone, but the defendant called back and told Mr. Smith, "[I]f you want to kill me . . . just meet me over on the Dandridge Bridge and I'll give you your chance." The defendant testified that he did not make or receive further telephone calls. He specifically denied threatening to kill Ms. Lane-Smith or Mr. Smith.

The defendant testified that he, his son, nephew, niece, and Ms. French ate dinner together, and shortly after 8:00 p.m., Ms. French retired to the bedroom because she had to be at work the next morning by 6:00 a.m. The defendant joined Ms. French in the bedroom, and he fell asleep. He testified that he was awakened when his son came into the bedroom to tell Ms. French that her mother had arrived. Ms. French's automobile was being repaired, and she needed her mother's vehicle to drive to work. After Ms. French left to drive her mother home, the defendant again fell asleep. He was uncertain how long Ms. French was gone, but he denied accompanying the women.

Later, that same night, the defendant's father called to report that he had received a telephone call from Ms. Lane-Smith's older sister. Her sister wanted to know what kind of vehicle that the defendant drove, and she said that the defendant was suspected of trying to burn down her sister's trailer. Disturbed by the sister's call, the defendant's parents drove to his residence and removed the children.

The defendant denied hearing anyone knocking on his door. He explained that the air conditioner and television in his bedroom made it difficult to hear. He remembered that Ms. French at one point awoke him to advise that a Pigeon Forge police officer had called and wanted to meet with him. Ms. French met the officers at the front door and allowed them to enter the residence. The defendant agreed to accompany the officers, and he asked for the opportunity to dress. The defendant testified that he put on a hat, pants, shoes, and a shirt but that the officers

would not permit him to brush his teeth or comb his hair. The defendant was transported and photographed, first at the Jefferson City police department and then at the Sevier County jail.

The defendant denied owning a black sweatshirt, much less wearing a sweatshirt in July. He testified that he smoked and was right handed. He expressly denied ever driving Ms. Yarborough's vehicle, having a fight with Mr. Smith that night, or splashing kerosene around Ms. Lane-Smith's trailer. He testified that he was not guilty of any of the charges.

On cross-examination, the defendant admitted that he and Ms. Lane-Smith had a "volatile" relationship and that she had secured an order of protection against him. The defendant said that after the relationship ended, they had continuing disagreements about his residence. He claimed that initially Ms. Lane-Smith only wanted her name removed from the deed to be relieved of that debt obligation; however, when the defendant received an offer on the property that would have "netted a substantial profit," she would not agree to the sale unless she received one-half of the profits. Consequently, the defendant kept the residence but did eventually remove her name from the property and trust deeds. The defendant also admitted that he and Ms. Lane-Smith quarreled about money after they parted company; he maintained that she stole $7,000 from his bank account, and for that reason, he refused to reimburse her for a $30 mirror that he had broken. Even so, the defendant professed his love for Ms. Lane-Smith and wanted her to move with him to Florida although he was living with Ms. French at the time. He also insisted that he and Ms. Lane-Smith were romantically interested in each other although they always met in public places and often had disagreements about money.

On direct examination, the defendant had maintained that whenever he called Ms. Lane-Smith, he would block his telephone number so that Mr. Smith would not know the defendant's identity. The state on cross-examination, however, pointed out that the defendant did not block his call number on July 28. The defendant's explanation was that he "didn't care if Chris [Smith] knew or not" at that point, despite making it difficult for Ms. Lane-Smith to accept his offer to move to Florida.

On direct examination, the defendant also maintained that he had never driven Ms. Yarborough's automobile. On cross-examination, he did disclose that he had "ridden" in the vehicle a few times, the latest being "a week or so" before July 28, when Ms. French had borrowed the car. The defendant was uncertain whether the car had floor mats. Regarding who opened the car doors the night he was arrested and for what reason, the defendant testified that Ms. Yarborough had called and told Ms. French to unlock the car because officers wanted to search it, and he "guess[ed]" that Ms. French "just opened the doors so they could do their search." The defendant said that he knew nothing about a candle or deodorant being sprayed inside the vehicle.

On redirect examination, the defendant clarified that the order of protection was issued because of the events of July 28; Ms. Lane-Smith had never before sought an order of protection. The defendant also said that he was unfamiliar with the term "volatile" that the state had used in describing his relationship with Ms. Lane-Smith. As for not caring whether Mr. Smith knew

he was calling on July 28, the defendant explained that Ms. Lane-Smith had been calling him for several weeks, leading him to believe that she "want[ed] to get back together"; his attitude toward Mr. Smith was "if he found out, so be it." The defendant estimated that as of July 28, he had been living with Ms. French less than two months.

Sherry French testified for the defense. She considered the defendant a friend, although she recently had moved out of his residence. Ms. French had attended school with Ms. Lane-Smith and Mr. Smith. In July 2002, Ms. French was employed by Isaac Enterprises working at a BP station in Morristown. She confirmed that the station sold kerosene, and she testified that spills frequently occurred by the kerosene tank. The kerosene would rot the soles of her shoes.

As of July 28, Ms. French's personal vehicle, a gray Oldsmobile, was being repaired. She produced and identified a repair bill showing that she left the vehicle to be repaired on July 25 and retrieved it approximately August 7 or 8. During that time, Ms. French borrowed her mother's vehicle on Thursday, July 25, but had to return it on Saturday, July 27. Ms. French testified that before returning the car, she vacuumed the interior, sprayed Febreze, and cleaned the tires with a rag and STP tire cleaner, a solvent that smelled like kerosene. Ms. French put the rag and tire cleaner in the back floorboard. Ms. French said that on occasion her mother, whose home had a kerosene heating system, had transported kerosene in the vehicle.

Ms. French testified that her mother had agreed to loan the vehicle again on Sunday to make it available for Ms. French to drive to work on Monday. No specific time on Sunday was mentioned. Ms. French, along with the defendant, and the defendant's son, niece and nephew, were together during the weekend. She recalled NASCAR racing being televised on Sunday, and she remembered leaving the house once with the children to get a pizza. For supper, she prepared spaghetti, and while cooking, she washed clothes. They ate at approximately 7:30 p.m.

Ms. French testified that she knew that the defendant and Ms. Lane-Smith had been in contact; the defendant talked about Ms. Lane-Smith "quite a bit," and occasionally Ms. French answered the telephone when Ms. Lane-Smith called. Ms. French claimed that she offered the defendant "a sympathetic ear" and just listened until July 28, when she advised him to call Ms. Lane-Smith and ask if she "wanted to work through things." Ms. French overheard part of one conversation. She was in the kitchen, and the defendant sounded "very upset." She became curious, walked into the dining room, and picked up the telephone extension. At that point, she heard Mr. Smith threaten to kill the defendant. Ms. French described the defendant as upset by the conversation but said that he "kind of settled down after awhile."

Ms. French decided to rest in bed at approximately 8:00 p.m., but she did not undress because she was expecting her mother to bring the Thunderbird automobile. The defendant's son woke her later at 9:17 p.m., and she drove to her mother's Kodak residence. Ms. French did not stay and visit with her mother, and Ms. French estimated that the trip took approximately 30 to 40 minutes. The defendant was in bed when Ms. French left, and he was still in bed when she returned.

To park the Thunderbird, Ms. French had to unlock a gate, drive the car into a parking area, and relock the gate.

Ms. French returned to the bedroom, and she recalled the defendant's son waking the defendant at some later time because the defendant's father was calling on the telephone. The men spoke, and Ms. French said she told the defendant "not to worry about it." Ms. French estimated the time as midnight when the defendant's parents picked up the children. Ms. French affirmed that she was present when the police arrived and arrested the defendant.

Ms. French testified that she opened the door in response to knocking. The defendant was in the bedroom, and the officers went into the bedroom while the defendant was dressing. Everyone went into the living room, and the defendant wanted to brush his hair. The officers would not permit him to do so, and Ms. French brought him a hat from the utility room. She also remembered bringing the defendant his wallet, which was wet from being accidently laundered.

After the defendant was removed from the house, Ms. French's mother called and was "hysterical" because someone had called, said that the defendant had burned down a house, and wanted her to sign a paper allowing her Thunderbird vehicle to be searched. Ms. French's mother wanted the vehicle to be unlocked to forestall the car being towed or torn apart. Ms. French did as her mother requested; she unlocked the car door and left it open. When asked why she opened the car door, Ms. French testified that she was upset and did not realize what she had done until one of the officers threatened that she had tampered with evidence.

To Ms. French's knowledge, the defendant did not leave his residence that evening and did not take the Thunderbird vehicle anywhere.

On cross-examination, the state pointed out that the label on the bottle of tire cleaner advertised "Popular vanilla scent." Ms. French responded that the "vanilla smell must not be too strong" because she thought it smelled like kerosene. She could not explain why the officers did not find the bottle of tire cleaner inside the Thunderbird, because she insisted that she left the bottle in the back floorboard. Ms. French also could not account for the presence of the candle inside the vehicle or account for the grass and hay found in the front floorboard because the floorboard was not in that condition when she drove her mother home Sunday night. As for the open car doors, Ms. French testified that she remembered opening only one of the car doors, the driver's side door. Contrary to the defendant's testimony that he had ridden in the Thunderbird several times, Ms. French could not recall any occasion when he had been inside the vehicle.

Ms. French's memory was vague regarding what happened when the defendant's parents came to pick up the children and afterwards. She could not say if she spoke with the defendant's parents or even if she got out of bed. She also thought that the defendant must have gotten out of bed, helped the children gather their clothes, and spoken with his parents, but she had no specific memory of those events. Although she admitted being upset that night, particularly after the telephone call and the defendant's parents arriving to get the children, Ms. French maintained

that she was able to go back to sleep and did not hear the officers the first time they knocked on the house doors.

Ms. French's mother, Geraldine Yarborough, was unavailable to testify at trial, but the defense read her prior testimony from the preliminary hearing. At that hearing, Ms. Yarborough testified about loaning her Thunderbird vehicle to her daughter on July 28. She recalled arriving at the defendant's residence about 9:30 p.m. She knocked on the door, and the defendant's son came to the door. Ms. Yarborough went inside and visited for a few minutes before her daughter drove her to her residence in Kodak. The defendant did not accompany them. Ms. Yarborough arrived home at 9:45 p.m., and her daughter called at approximately 10:00 p.m. to report that she had returned safely to the defendant's residence.

On cross-examination during her preliminary hearing testimony, Ms. Yarborough said that she had hauled kerosene and gasoline in her automobile for her lawn mower. She was uncertain of the last date prior to July 28, but she explained that she usually placed the kerosene or gasoline in the rear floorboard on the driver's side of the vehicle. Several months prior to July, Ms. Yarborough had switched floor mats in the vehicle, and two or three days prior to July 28, Ms. Yarborough's daughter had cleaned the tires, which caused the vehicle to have a kerosene odor.

When the police officer contacted Ms. Yarborough about her vehicle, she called and instructed her daughter to unlock the car and explained that an officer would be coming by to see if any kerosene was inside the car. She denied telling her daughter to spray anything inside the car.

The defendant's mother and father, testified about the events of July 28 and the preceding months. Mr. Stallings had seen the defendant and Ms. Lane-Smith together in May or June talking and often sitting together in a vehicle. On July 28, at 10:11 p.m., Ms. Lane-Smith's sister called him to report that the defendant had attempted to burn down her sister's trailer, and the sister wanted to know the make and model of the defendant's vehicle. After the call, Mr. Stallings telephoned the defendant's residence and passed on the information to the defendant. The defendant's parents also decided to drive to Jefferson City and pick up the grandchildren. Mr. Stallings testified that the defendant was asleep when he arrived "somewhere around midnight." Mr. Stallings detected no odor of kerosene on the defendant, and the defendant did not have any evident injuries or appear to have been in a recent altercation.

Grace Stallings' testimony was brief. She corroborated her husband's account of events. She testified that when she and her husband arrived at the defendant's residence at midnight, the defendant was asleep in bed. The defendant came out of the bedroom wearing boxer shorts and appeared normal. Mrs. Stallings said she observed no injuries on her son; he did not appear freshly showered and did not smell of kerosene.

The defendant's son, Matt Stallings, testified that he lived with his grandmother but that he stayed with the defendant "about every other weekend." He was with the defendant on the

weekend of July 28 and recalled watching on television a NASCAR Winston Cup Series race on Sunday. Other than a brief afternoon drive to get pizza, the group did not leave the residence.

Matt Stallings described the layout of the residence, including the location of the various bedrooms, television sets, and exterior and interior doors. On the evening of July 28, Ms. French went to bed at 8:00 p.m. because of her employment, and the defendant retired approximately 15 minutes later. The children in the house were still awake. Matt Stallings heard Ms. Yarborough drive up to the house because she pulled up "right by the fence line outside [his] window." She knocked on the front door, and he opened the door, invited her inside, and notified Ms. French. Matt Stallings estimated the time to be 9:30 p.m., and he thought Ms. French was gone "[n]o more than about 25 minutes." The defendant stayed in bed and did not accompany Ms. French and her mother. When Ms. French returned, she entered through the kitchen door, and she and Matt Stallings spoke for a few minutes before she again retired to the bedroom.

Approximately 10 to 15 minutes after Ms. French returned, Matt Stallings' grandfather called, and Matt Stallings took the telephone to the defendant's bedroom. Matt Stallings said that he did not know what was discussed, but at approximately midnight his grandfather and grandmother arrived and removed the children from the residence.

On cross-examination, the state emphasized inconsistencies between Matt Stallings' preliminary hearing and trial testimony. At the preliminary hearing, Matt Stallings had testified that his father went to bed "around 8:15" and that he did not recall seeing him the rest of the evening. At trial, he testified that he was nervous when he previously testified and made a mistake. He maintained at trial that after 8:15 p.m., he saw the defendant when Ms. Yarborough came to the house and again when the grandparents came to the house. Also, at the preliminary hearing, Matt Stallings testified that he had never seen his father wear a NASCAR cap or any cap; at trial, he clarified that he had seen his father in a cap, but "not much."

On redirect examination, Matt Stallings explained where his father customarily parked his Chevelle and Oldsmobile, and he testified that he did not hear either automobile leave the premises during the evening of July 28.

The defendant's 14-year-old niece, Summer Stallings, testified about the events of July 28 at the defendant's residence. She recalled that Ms. French cooked dinner, and they ate at approximately 7:00 p.m. Ms. French retired to the bedroom "around 8:00." Approximately 15 to 20 minutes later, the defendant went to bed, but the children stayed up watching television. Summer Stallings testified that "papaw" called "a little bit after 10:00," but she did not speak with him. She did not see the defendant at that time. Ms. French drove her mother home "around 9:30 or so." Summer Stallings could not recall if she saw the defendant when her grandparents arrived to pick up the children.

The defendant's 10-year-old niece, Dakota Stallings, testified that she remembered that the defendant did not go anywhere on July 28 and that he mowed the yard. She also testified

that the defendant and Ms. French went to bed, and Ms. French's mother came to the house to loan her automobile to Ms. French for transportation the following morning. Her grandparents picked up the children later in the evening. Dakota Stallings had a specific memory about hearing the defendant arguing with "Chris" on the telephone earlier in the evening. She testified that she picked up the telephone and heard "Chris" Smith threaten to kill the defendant. On cross-examination, Dakota Stallings agreed that she did not again see the defendant after he had gone to bed much earlier in the evening.

The defense rested at the conclusion of Dakota Stallings' testimony, and the state presented no rebuttal proof. Based on the evidence presented, the jury found the defendant guilty of attempted aggravated arson, aggravated assault, assault, and possession of explosive components.

I. SUPPRESSION OF EVIDENCE

Pretrial, the defendant filed a motion seeking suppression of "any evidence obtained prior to and during the arrest of [the defendant] on or about July 28, 2002," including "any evidence pertaining to the odor of kerosene or any other accelerant coming from a vehicle parked in [the defendant's] driveway." The trial court conducted a suppression hearing, at which time the defense identified the evidence sought to be suppressed as the odor of kerosene.

The state had challenged the defendant's standing because he did not have an ownership interest in the Thunderbird. Consequently, the trial court required the defense first to demonstrate standing. The defendant called Officer Allen Kelley who testified that he received and responded to an assistance request to look for a light colored sedan at the defendant's residence. Officer Kelley spotted a vehicle matching the description at the defendant's residence inside a fenced-in area with a locked gate. He called the requesting officer and reported the license tag number, and the requesting officer then asked Officer Kelley to determine if the defendant was inside the residence. Officer Kelley testified that he went to the rear of the house to knock on the back door. To reach the back door, Officer Kelley "jumped the fence," and as he was walking through the back yard, he passed the blue vehicle that was parked in the driveway, approximately 10 to 15 feet from the house. Officer Kelley understood that the defendant had been driving the vehicle earlier that evening in connection with an attempted arson. On cross-examination, Officer Kelley said that when he first drove by the residence, he could see the rear of the vehicle, which was about 10 feet from the road. He specified that the vehicle was behind the fence in the back yard of the residence.

Pigeon Forge Officer Randy Smith testified that he learned that Geraldine Yarborough owned the vehicle and had loaned it to her daughter. On cross-examination, he confirmed that Ms. Yarborough signed a form consenting to the search of the vehicle.

Based on the proof, the trial court ruled that the defendant had not established standing and that detection of an odor is not a search.

> He must establish that he has an interest in that vehicle, that it's protected by the expectation of privacy. It doesn't have to be ownership. It can be possession but that possession must be shown that gives him the right to possess that vehicle as opposed to other people.
>
> The only proof in front of the Court is that a vehicle belonging to a Geraldine Yarborough, which had been loaned to her daughter, a Ms. French, was smelled by an officer. That's the proof. There was no search. An odor emanating from within a vehicle outside is not a search of the vehicle. That's an odor. . . .
>
> When [the officers] did conduct the search, they did so with the consent of the actual owner who had standing to give consent. So the Court must respectfully hold that the defendant has no standing to raise an issue with respect to smelling an odor emanating from the vehicle of Geraldine Yarborough.

The trial court then added that when the officer jumped the fence to approach the rear door of the residence, "his purpose was not to search, that his purpose was to make contact." The officer's purpose, the trial court stated, "was not to arrest, although probable cause did exist that this defendant had committed a felony, that crossing the fence to knock on the door was not a search, that the smell of kerosene emanating from the vehicle was incidental to the officer trying to get somebody's attention on the inside of the house and not for the purpose of search."

On appeal, the defendant contests the trial court's ruling relative to standing on the basis that it failed to take into consideration that the Thunderbird vehicle was parked in the curtilage of the defendant's residence. Before addressing that issue, we first consider the state's initial argument that the defendant's motion and suppression evidence related only to the odor of kerosene, and that therefore the defendant has waived any suppression complaint regarding the state's introduction of "physical evidence" retrieved from Ms. Yarborough's vehicle pursuant to her consent to search. We agree with the state.

Motions to suppress evidence must be made prior to trial. Tenn. R. Crim. P. 12(b)(3). Failure to raise such defense or objection pre-trial constitutes a waiver of the objection unless good cause for failure to raise the objection timely is shown. *See id*. 12(f); *State v. Blair*, 145 S.W.3d 633, 641 (Tenn. Crim. App. 2004); *State v. Hamilton*, 628 S.W.2d 742, 744 (Tenn. Crim. App. 1981). The only evidence specifically identified in the defense pretrial suppression motion was the odor of kerosene coming from the vehicle parked in the defendant's driveway, and at the beginning of the suppression hearing, that same evidence was the only issue sought to be litigated. It was incumbent on the defendant to identify with reasonable precision the evidence sought to be suppressed. Therefore, we confine our analysis to the kerosene odor emanating from the Thunderbird parked on the defendant's property.

One who challenges the reasonableness of a search or seizure has the initial burden of establishing a legitimate expectation of privacy in the place or thing to be searched. *State v. Oody*, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991). One who does not have such an expectation of privacy lacks "standing" to challenge the search. *State v. Patterson*, 966 S.W.2d 435, 441 n.5 (Tenn. Crim. App. 1997). In determining whether an individual has a legitimate expectation of privacy, relevant factors include: (1) property ownership; (2) whether the defendant has a possessory interest in the thing seized; (3) whether the defendant has a possessory interest in the place searched; (4) whether he has a right to exclude others from that place; (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; (6) whether he took normal precautions to maintain his privacy; and (7) whether he was legitimately on the premises. *Oody*, 823 S.W.2d at 560.

The trial court's factual findings in this case relative to standing are meager but essentially undisputed. On appellate review, we are mindful that the trial court's findings in a suppression hearing will be upheld unless the evidence preponderates otherwise. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Id*. The application of law to the facts found by the trial court, however, is a question of law that is reviewed de novo. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

We have no quarrel with the trial court's findings, which are supported by the evidence, that the defendant failed to show that he had an ownership or possessory interest in Ms. Yarborough's vehicle. Those findings, however, are not dispositive. Ms. Yarborough's Thunderbird was parked on the defendant's property,[1] within the fenced and gated curtilage adjoining the defendant's residence. The law is settled that the curtilage is entitled to the same constitutional protection against ground entry and seizure as the home. *See State v. Prier*, 725 S.W.2d 667, 671 (Tenn. 1987). The curtilage is understood to include "the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes." *Welch v. State*, 154 Tenn. 60, 64, 289 S.W. 510, 511 (1926). Thus, the defendant had standing to object to a search conducted within the curtilage of his residence.

The trial court also noted that detection of an odor is not a search. That remark is partially correct. "Authorities may take note of anything evident to their senses *so long as they have a right to be where they are* and do not resort to extraordinary means to make the observation." *State v. Hurley*, 876 S.W.2d 57, 67 (Tenn. 1993) (emphasis added). Officer Kelley was asked at the suppression hearing, "At what point did you look in the blue car?" He started to respond, "When I was walking . . . ," at which point the state objected, the trial court sustained the objection, and Office Kelley never finished his response. At trial, Officer Kelley testified that when he received

[1] Although the trial court did not make a determination whether the defendant owned the residence and property on which the vehicle was parked, the evidence at trial removes any doubt of the defendant's ownership and possessory interest in the residence and real property. *See State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998) (court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court's ruling on a pretrial motion to suppress).

no response to his knocking on the back door, he left through the driveway at which point he noticed that the passenger side window was rolled down approximately two inches. He said he "kind of leaned over and shined [his] light in it, and [he] could smell what [he] thought was gasoline or kerosene type smell." At least one reasonable interpretation of this testimony is that Officer Kelley did not detect a kerosene odor until he was standing beside the vehicle, well inside the curtilage of the residence, which again implicates the defendant's privacy interests for purposes of standing.

The state on appeal insists that the warrantless search was permissible under the exceptions for consent, probable cause to search with exigent circumstances, and plain view. The trial court's erroneous ruling on standing, however, obviated any need for the state to go forward and meet its burden of proof to establish the existence of an exception to the warrant requirement, and in our view the record is not adequate to evaluate the state's claims.

We have considered remanding this case to the trial court for a suppression hearing at which time the state would bear the burden of establishing an applicable exception to the warrant requirement, but it occurs to us that even if the search did not fit into the exceptions cited by the state, the kerosene odor in the vehicle would have been inevitably discovered. Under the inevitable discovery doctrine, illegally obtained evidence is admitted by the court when the evidence would have inevitably been discovered by lawful means. *See State v. Patton*, 898 S.W.2d 732, 735 (Tenn. Crim. App. 1994) (citing *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984)). The officers lawfully ascertained the location of the vehicle and the license tag number and obtained Ms. Yarborough's consent to search. Armed with those facts and the information developed at the mobile home, a search warrant, permitting entry into the curtilage, easily could have been secured. As a result, the error in rejecting the defendant's standing is harmless beyond a reasonable doubt.

Therefore, although we hold that the trial court's ruling on standing was in error, the error in our opinion was harmless beyond a reasonable doubt.

II. SUFFICIENCY OF THE EVIDENCE

The defendant contests the sufficiency of the evidence relative to his convictions of aggravated assault, attempted aggravated arson, possession of explosive components, and assault. We begin with our standard of appellate review and then review each conviction in turn.

A. Standard of Appellate Review

Our consideration of the defendant's evidence sufficiency claims is grounded in legal bedrock. When an accused challenges the sufficiency of the evidence, an appellate court inspects the evidentiary landscape, including the direct and circumstantial contours, from the vantage point most agreeable to the prosecution. The reviewing court then decides whether the evidence and the inferences that flow therefrom permit any rational fact finder to conclude beyond a reasonable doubt that the defendant is guilty of the charged crime. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn.

1985); *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining sufficiency of the proof, the appellate court does not replay and reweigh the evidence. *See State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the reviewing court will not substitute its judgment for that of the trier of fact. Instead, the court extends to the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences that may be drawn from the evidence. *See Cabbage*, 571 S.W.2d at 835.

With these principles in mind we review the defendant's convictions.

B. Aggravated Assault

As relevant to this case, Tennessee Code Annotated section 39-13-101 provides that a person commits the offense of assault who "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." Tenn. Code Ann. § 39-13-101(a)(2) (2003). An assault is graded as "aggravated" when a person "[i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and . . . uses or displays a deadly weapon." *Id.* § 39-13-102(a)(1)(B).

The defendant maintains that the evidence is fatally deficient for three reasons. First, he argues that he did not possess a deadly weapon. Second, he claims that the state failed to prove the requisite intent. Last, he maintains that no proof was presented that Chris Smith was ever placed in fear. Because these arguments overlap somewhat, we begin with an overview of the principles pertinent to the variety of aggravated assault charged in this case.

"[T]he presence of danger is not an essential element of aggravated assault committed by placing another person in fear of imminent danger of death or serious bodily injury." *State v. Moore*, 77 S.W.3d 132, 135-36 (Tenn. 2002). It therefore follows that "one can commit the offense of aggravated assault by placing another person in fear of danger even if there is no risk of danger." *Id*. at 136.

In addition, the victim's fear of imminent bodily injury can be established exclusively by circumstantial evidence, such that if the victim fails to testify about being fearful or even if the victim denies being fearful, the evidence is not ipso facto insufficient. *See State v. Jamie John Schrantz*, No. W2002-01507-CCA-R3-CD (Tenn. Crim. App., Jackson, Dec. 2, 2003) (evidence sufficient although victim "vehemently denied" being fearful); *State v. Tommy Arwood, Jr.*, No. 01C01-9505-CC-00159 (Tenn. Crim. App., Nashville, May 24, 1996) (evidence sufficient although no testimony that defendant's words and actions caused fear of imminent bodily harm); *State v. Ricky Atkins*, No. 03C01-9812-CC-00432 (Tenn. Crim. App., Knoxville, Nov. 10, 1999) (evidence

sufficient although victim did not specifically testify that he was fearful). "[C]ircumstances that suggest the victim experienced fear" include a victim summoning the police for help following the assault, a victim's attempt at self-defense suggesting fear, and a victim's emotional, post-altercation demeanor. *See Jamie John Schrantz*, slip op. at 4. The nature of the fear of imminent bodily injury required to be proven was explained in the following fashion in *State v. Gregory Whitfield*, No. 02C01-9706-CR-00226 (Tenn. Crim. App., Jackson, May 8, 1998) (defendant convicted of aggravated robbery and aggravated assault):

> The fear contemplated by the statute is not the fear of being robbed or the fear of the perpetrator, but the fear or reasonable apprehension of being harmed. As acknowledged by the [defendant], an assault has been defined as an act which conveys to the mind of the person set upon a well grounded apprehension of personal injury or violence. The element of "fear" is satisfied if the circumstances of the incident, within reason and common experience, are of such a nature as to cause a person to reasonably fear imminent bodily injury.

Id., slip op. at 4.

The term "deadly weapon" is assigned a broad definition pursuant to Tennessee Code Annotated section 39-11-106(a)(5). *See State v. Madden*, 99 S.W.3d 127, 137 (Tenn. Crim. App. 2002) (identifies two classes of deadly weapons: those being either deadly per se or deadly by reason of the manner in which they are used). A deadly weapon can be "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury," or it can be "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-106(a)(5); *see State v. Toliver*, 117 S.W.3d 216 (Tenn. 2003) (heavy duty extension cord wrapped with coat hangers and duct tape was deadly weapon); *Madden*, 99 S.W.3d at 137 (pointed-toe cowboy boots worn by defendant while kicking victim constituted deadly weapon).

With the foregoing principles firmly in mind, we explore the defendant's contentions. He argues that the record is devoid of proof that Chris Smith feared imminent bodily injury, because until struck with the jug, he never saw anything in the defendant's hands and never saw a lighter prior to or during the fray. The defendant makes dire predictions that basically benign physical encounters will be transformed into aggravated assaults regardless whether any weapon was used or displayed as long as a weapon is secreted on the primary aggressor. He argues in his brief that the "legislature could not, and did not intend these results" and that "[w]here fear of the victim is the basis for assault, it logically follows that this fear must be based in whole, or in part, on the known presence of a deadly weapon." We respectfully disagree.

Chris Smith testified that during the altercation, he was afraid. He explained, "I wasn't sure what was going to happen, you know. I was – I was scared for my family, I was scared for my own life, my family's life." Moreover, the circumstances surrounding the altercation fully

corroborate that Mr. Smith was fearful of imminent bodily injury. Only hours earlier, the defendant had made a sinister comment that he knew where Mr. Smith's mother lived, and the defendant had challenged Mr. Smith "to settle this like men." The defendant crowned his threats by asking Ms. Lane-Smith multiple times, "Are you ready to die?" Later in the evening, Mr. Smith became suspicious when he heard "gravels rustling around . . . at the end of the trailer." Mr. Smith was immediately concerned, so much so that he retrieved a handgun and hunting knife before investigating the suspicious sounds. Upon recognizing the defendant, Mr. Smith grabbed the defendant's shirt and stuck the handgun to the defendant's chest, from which the jury was entitled to conclude that Mr. Smith initiated a preemptive strike as a gesture of self-defense and to immobilize the individual who had been issuing violent threats and who had no legitimate reason to be slinking about Mr. Smith's residence. The defendant responded by striking Mr. Smith with a milk jug, the contents of which splattered everywhere and doused Mr. Smith who immediately recognized the distinctive smell of kerosene – a dangerous and flammable substance. In view of those existing circumstances, the presence or absence of a lighter is of no consequence to the inquiry whether the victim feared imminent bodily injury, because the existence of actual danger is not required to establish the element of fear of imminent bodily injury. *See Moore*, 77 S.W.3d at 135-36. When a person, who had earlier issued threats, covertly enters and trespasses on another's property with a jug containing kerosene, it is altogether reasonable for the victim to assume that the intruder had the intention and means to ignite the kerosene. The evidence, we discern, is more than sufficient to establish fear of imminent bodily injury.

Next, we turn to the defendant's argument that the state failed to establish his criminal intent because Mr. Smith was the first aggressor and because the defendant was merely reacting to the initiation of the conflict by Mr. Smith. However, the theory of defense was mistaken identification and/or complete fabrication by state witnesses, and the defendant offered evidence to support an alibi defense. He never pursued a theory of self-defense because he contended that he was at his own residence when the altercation occurred. The jury rejected that defense, and all of the circumstances surrounding the defendant's threats, surreptitious entry onto the Smiths' property, false excuse about borrowing some gasoline, and striking Mr. Smith with a milk jug containing kerosene establish the defendant's criminal intent.

Neither the defendant nor the state has cited any Tennessee authority that directly addresses whether gasoline/kerosene can constitute a deadly weapon. Although the defendant concedes that ignited kerosene might arguably become a deadly weapon, he disputes that the same conclusion follows when no evidence of any flame is offered. We note that in connection with a sentencing issue, the court in *State v. Maruja Paquita Coleman*, No. 01C01-9401-CR-00029, slip op. at 11 (Tenn. Crim. App., Nashville, July 31, 1997), commented, "[W]e agree with the state that the defendant used the gasoline in a manner to make it a deadly weapon[,] . . . T.C.A. § 39-11-106(a)(5)(B)."

Our research discloses decisions in two other jurisdictions discussing a deadly weapon in the context of gasoline that was not ignited. North Carolina has recognized that matches found on the floor of the store and gasoline doused on the store clerk, although never ignited, can

be considered a dangerous weapon. *State v. Cockerham*, 129 N.C. App. 221, 226, 497 S.E.2d 831, 833-34 (1998). Kansas has held that gasoline constituted a dangerous weapon when the defendant threatened to throw gasoline on the store clerk and when the clerk testified that he believed bodily injury would occur as a result. *State v. Graham*, 27 Kan. App. 2d 603, 6 P.3d 928 (2000).

Recently, in *State v. Thomas Martin McGouey*, No. E2005-00642-CCA-R3-CD (Tenn. Crim. App., Knoxville, May 24, 2006), the court was confronted with a first-impression issue whether an unloaded pellet gun without a propulsion source is a deadly weapon. The court examined the language in 39-11-106(a)(5) and 39-11-106(a)(11) that defines "deadly weapon," and it concluded that the language is "clear and unambiguous." *Id.*, slip op. at 4. Because section 39-11-106(a)(11) defines a "firearm" as "any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use," the court stated, "Arguably, a CO2 powered pellet gun is not a firearm . . . because the pellet gun does not expel a projectile by an explosive." *Id.* Nevertheless, the court was confident that such a pellet gun is a "deadly weapon" because "it is capable of causing death or serious bodily injury *when operated as intended*." *Id.* (emphasis in original).

Much like an unloaded pellet gun without a CO2 cartridge, kerosene doused on a victim by an assailant who is bent on arson constitutes a deadly weapon in our opinion. Consequently, the defendant's aggravated assault conviction is not infirm on that basis.

In summary, we hold the evidence in the record is legally sufficient to support the defendant's aggravated assault conviction.

C. Attempted Aggravated Arson, Possession of Explosive Components, and Assault

The defendant's evidence sufficiency attack on the remaining three convictions relies on the same arguments. They are: (1) the evidence was insufficient to prove identity and/or rebut the defendant's alibi defense; (2) the proof did not establish when or where the kerosene was splashed on the trailer and did not exclude the possibility that the kerosene was splashed during the struggle; and (3) the proof lends itself to the reasonable conclusion that the trespasser had the intent to vandalize personal property, such as the boat and truck, rather than destroy the mobile home.

All of these arguments address disputed factual issues that the jury was required to resolve and challenge reasonable inferences that the jury was entitled to reach. The jury obviously found Chris Smith to be credible regarding his identification of the assailant, and the jury rejected the defense testimony aimed at establishing an alibi for the defendant. Also, the inference or deduction that at least a portion of the kerosene was deliberately poured on the trailer before the struggle is entirely reasonable. Likewise reasonable is a conclusion that the intruder intended to set fire to the mobile home. The defendant's interpretation of the evidence, although not unreasonable, is most assuredly not the only reasonable inference that can be drawn from the evidence, and "when reasonable inferences collide, a properly functioning adversarial system of justice respects the jury's

verdict." *State v. Jeffrey Hopkins*, No. W2004-02384-CCA-R3-CD, slip op. at 16 (Tenn. Crim. App., Jackson, Sept. 23, 2005).

Following the well-settled rules governing our review, we hold the evidence is legally sufficient to support the defendant's attempted aggravated arson, assault, and possession of explosive components convictions.

III. FAILURE TO GRANT MISTRIAL

In his third issue, the defendant complains that the trial court's failure to grant a mistrial deprived him of a fair trial. He predicates his complaint on the following cross-examination question to Ms. Lane-Smith about certain telephone calls in May and June and on her response:

> Q. And you - and he called you back; didn't he?
>
> A. Yeah. I tried to do this a civil way. I mean, you know, I'm - you know, I was in love with the guy. He has a bad drinking problem and a bad drug problem.

Defense counsel interrupted, requested a bench conference, and moved for a mistrial. The state conceded that the defense had not specifically opened the door regarding any drug or alcohol problems, but it argued that the defense questions about the couple's relationship had "invited" the response.

The trial court ruled that the witness's answer was unresponsive to the question, and for that reason the court instructed the jury "to disregard the portion of the witness's answer with respect to drinking and drugs" and told the jury that it "may not consider it at this point in time." The trial court also ruled, however, that the testimony "would otherwise be admissible under the questions that have already been asked about the relationship and about the dispute as to how they were getting along, that sort of thing." The defense avoided further questions that might solicit similar responses from Ms. Lane-Smith.

Although not raised by the state on appeal, the record before us reveals that this issue has been waived. That is, the defendant's complaint was not raised in either his original or amended motion for new trial. Tenn. R. App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.").

IV. PLAIN ERROR IN ADMISSION OF EVIDENCE REGARDING CONDITION OF FORD THUNDERBIRD AUTOMOBILE

Advancing plain error as a basis for new trial, the defendant asserts that inasmuch as no factual basis existed that he participated in or directed anyone else to open the doors to the Thunderbird, spray air freshener, or place a candle in the vehicle's floorboard, the state's introduction of such evidence constituted reversible error. The defendant relies on the testimony of Officers Kelley and Winstead as conclusively proving that when he was arrested and escorted from his residence, the doors to the vehicle were still closed. The defendant writes that there "is no evidence anywhere in this record that [the defendant] directed someone to 'freshen up' the Thunderbird" and that there is no "evidence in this record that he, personally, had such an opportunity." The state argues that the defendant's failure to object to the testimony at trial waives consideration on appeal, that the appearance of the vehicle was relevant because it was suspected of being used in an attempted aggravated arson, and that for plain error purposes, the defendant cannot demonstrate that a clear and unequivocal rule of law was breached, that a substantial right was adversely affected, or that consideration of the error is necessary to do substantial justice. As we shall explain, we agree with the state's position and decline to order a new trial.

The defendant cites *Smartt v. State*, 112 Tenn. 539, 80 S.W. 586 (1903), and *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992), as support for the proposition that the state was required to lay a foundation that the defendant was connected with the condition of the vehicle. Neither *Smartt*nor *West*, however, repudiates the efficacy of circumstantial evidence. Furthermore, the testimony in *Smartt* meets the current, prevailing definition of "relevant evidence" set forth in Evidence Rule 401. Tenn. R. Evid. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.); *see State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978) (approving the definition of relevance found in Rule 401 of the new Federal Rules of Evidence). Once evidence satisfies the definition of relevance, it becomes admissible unless, for example, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. In our opinion, Evidence Rule 403 did not compel the exclusion of the relevant evidence.

Even if some or all of the testimony regarding the condition of the Thunderbird should have been excluded, we agree with the state that the defendant's complaint does not rise to the level of plain error. Before an error may be so recognized, it must be "plain" and must affect a "substantial right" of the accused. The term "plain" equates to "clear" or "obvious." *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). Plain error is not error that is simply conspicuous; rather, it is especially egregious error that strikes at the fairness, integrity, or public reputation of judicial proceedings. *See State v. Wooden*, 658 S.W.2d 553, 559 (Tenn. Crim. App. 1983).

In *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994), this court defined "substantial right" as a right of "fundamental proportions in the indictment process, a right to the

proof of every element of the offense and . . . constitutional in nature." In that case, this court established five factors to be applied in determining whether an error is plain:

> (a) the record must clearly establish what occurred in the trial court;
>
> (b) a clear and unequivocal rule of law must have been breached;
>
> (c) a substantial right of the accused must have been adversely affected;
>
> (d) the accused [must not have waived] the issue for tactical reasons; and
>
> (e) consideration of the error must be "necessary to do substantial justice.

Id. at 641-42 (footnotes omitted). Our supreme court characterized the *Adkisson* test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

Even if error occurred, we are unpersuaded that a clear and unequivocal rule of law was breached, that a substantial right of the defendant was adversely affected, or that examining the error is required to accomplish substantial justice. Accordingly, we decline the defense invitation to find plain error.

V. UNANIMITY INSTRUCTION

Another plain error claim raised by the defendant concerns the trial court's jury instructions on the elements of criminal attempt, aggravated arson, and aggravated assault that used the disjunctive word "or" without further clarification and contained no enhanced instruction to preserve the defendant's right to a unanimous verdict. As we shall explain, this issue has been waived and does not rise to a showing of plain error.

Rule 3(e) of the Tennessee Rules of Appellate Procedure provides that for appeals "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other grounds upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial).

In the case herein, the defendant failed to raise the jury instruction issue in a motion for new trial. Consequently, we can consider the defendant's argument only if the matter qualifies

as plain error under Tennessee Rule of Criminal Procedure 52(b). *See Smith*, 24 S.W.3d at 282-83; *Adkisson*, 899 S.W.2d at 639. As we shall explain, we are not persuaded that the defendant has successfully carried his burden of persuasion in establishing a plain error claim.

Most fundamentally, it is uncertain what "clear and unequivocal rule of law" was broken. In prosecutions involving a single offense but alternate theories for the accused's committing that offense, a jury unanimity problem is not normally implicated. *See State v. Keen*, 31 S.W.3d 196, 208 (Tenn. 2000) (stating that "research reveals no case . . . in which we have held that the right to a unanimous jury verdict encompasses the right to have the jury unanimously agree as to the particular theory of guilt supporting conviction for a single crime"); *State v. Lemacks*, 996 S.W.2d 166, 170-71 (Tenn. 1999) (holding in a driving while under the influence case that a general verdict of guilty did not present a unanimity problem even though some evidence indicated that the defendant was driving the car while other evidence indicated that he was criminally responsible for another person driving the car); *State v. Cribbs*, 967 S.W.2d 773, 787 (Tenn. 1998) (jury's finding the defendant guilty of first degree murder raised no verdict unanimity problem even though some jurors may have believed the defendant committed felony murder while others believed he committed premeditated murder).

The defendant in this case directs our attention to *State v. Forbes*, 918 S.W.2d 431 (Tenn. Crim. App. 1995), in which the court ruled that "[when] there is technically one offense, but evidence of multiple acts which would constitute the offense, a defendant is still entitled to the protection of unanimity." *Id*. at 446. Defendant Forbes was charged in the indictment with "making *and* presenting" certain calendars with knowledge of their falsity and with intent to affect the course or outcome of an investigation or official proceeding, in violation of Code section 39-16-503(a)(2). The trial court instructed the jury that the offense was complete if the defendant "made *or* presented" the calendars. The defendant raised a unanimity issue, claiming that the instruction permitted the jury to convict for either making the calendars on one day or presenting the calendars on a separate day. *Id*. at 445. Under those circumstances, the court ruled that the unanimity interest was implicated, and it reversed and remanded for a new trial. *Id*. at 447.

By contrast, the instant case clearly involved a single episode in which the defendant went to the Smith trailer, poured kerosene on the trailer, and assaulted Mr. Smith physically and again with a deadly weapon. We detect no danger that jurors could have differed or settled upon separate acts. The defendant admits as much when, for example, he argues that for the aggravated assault charge, some jurors could have found that the defendant "used" a deadly weapon whereas other jurors might have found that he "displayed" a deadly weapon. Either way, the defendant committed only one act at a discrete time and place, and *Forbes* does not extend to the facts in this case. Accordingly, we reject the defendant's invitation to find plain error.

That said, we discern an issue of a different nature. The relevant statutes covering arson, Tenn. Code Ann. § 39-14-301 (2003), aggravated arson, *id*. § 39-14-302, and criminal attempt, *id*. § 39-12-101, provide for multiple means of commission. Arson, for instance, can be committed by a person who knowingly damages a structure by means of a fire or explosion (1) "[w]ithout the consent of all persons who have a possessory, proprietary or security interest therein," or (2) "[w]ith

intent to destroy or damage any structure to collect insurance for the damage or destruction or for any unlawful purpose." *Id*. § 39-14-301(a)(1), (2). Aggravated arson requires that a person commit "arson" (1) "[w]hen one (1) or more persons are present therein," or (2) "[w]hen any person, including firefighters and law enforcement officials, suffers serious bodily injury as a result of the fire or explosion." *Id*. § 39-14-302(a)(1), (2). Criminal attempt can be committed by a person who (1) "[i]ntentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be," (2) "[a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part," or (3) "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id*. § 39-12-101(a)(1), (2), (3).

The indictment in this case alleged the (a)(1) variety of aggravated arson with the underlying arson being of the (a)(1) variety, but the nature of the attempt was unspecified. Without objection by either the state or the defense, the trial court instructed the jury regarding the (a)(1) mode of committing aggravated arson, both the (a)(1) and (a)(2) mode of committing arson, and all three modes, (a)(1), (a)(2), and (a)(3), of criminal attempt. The jury returned a general verdict finding the defendant guilty of attempted aggravated arson.

With respect to aggravated assault, the indictment in count 2 charged that the defendant did "intentionally by the use of a deadly weapon cause Chris Smith to reasonably fear imminent bodily injury." In its jury instructions, the trial court employed the statutory language, "uses or displays a deadly weapon." *See* Tenn. Code Ann. § 39-13-102 (2003). Again, the jury returned a general verdict finding the defendant guilty of aggravated assault.

"[W]hen a statute contains different ways to commit the offense it proscribes, the instruction given to the jury should be limited to the precise offense alleged in the charging instrument to the exclusion of the remaining theories." *State v. Wayne E. Mitchell*, No. 01C01-9209-CR-00295, slip op. at 6 (Tenn. Crim. App., Nashville, Mar. 11, 1993). In this case, no problem arises from the instruction regarding attempt. The three subdivisions regarding criminal attempt "are not intended to define mutually exclusive kinds of criminal attempt," and "there is no requirement that the jury unanimously agree on one of the three theories necessary to support an attempted crime." *State v. Daniel Joe Brown*, No. 02C01-9611-CC-00385, slip op. at 17 (Tenn. Crim. App., Jackson, Dec. 3, 1997). As for aggravated assault and arson, any error does not rise to the level of plain, egregious error that "strikes at the fairness, integrity, or public reputation of judicial proceedings." *Wooden*, 658 S.W.2d at 559. The theory of defense was alibi. If the jury accredited the witnesses, it necessarily found that the defendant did not have the consent of Mr. and Mrs. Smith to damage the mobile home and that he acted with an unlawful purpose. Likewise, it is difficult to imagine that a potential existed that the jury would split its findings about whether the defendant used or displayed a deadly weapon. The inclusion of language about displaying a deadly weapon was mere surplusage, in our opinion, that did not affect the outcome of the trial. *See State v. Faulkner*, 154 S.W.3d 48, 61 (Tenn. 2005)

(inclusion of nature-of-conduct language in defining intentionally mere surplusage that did not affect outcome of trial).

VI. CUMULATIVE ERROR

We note that the defendant also claims that cumulative errors denied him the right to a fair trial. Taking the record as a whole, having evaluated each issue and finding any error to be harmless, we conclude that the defendant was not denied a fair trial.

VII. SENTENCING

The defendant's last complaints are that his sentence is excessive and that the trial court erred in ordering consecutive sentencing. The trial court imposed a maximum 12-year sentence for his attempted aggravated arson conviction, *see* Tenn. Code Ann. § 40-35-112(a)(2) (2003) (establishing a minimum of eight years and a maximum of 12 years for Class B offenses, Range I), and a maximum six-year sentence for his aggravated assault conviction, *see id.* § 40-35-112(a)(3) (establishing a minimum of three years and a maximum of six years for a Class C offense, Range I), for an effective sentence of 18 years. Regarding the attempted aggravated arson sentence, the parties are in agreement that the trial court erred in using the midpoint of the range as the presumptive starting point.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) & -35-103(5) (2003).[2]

[2] Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* 2005 Tenn. Pub. Acts, ch. 353, §§ 5, 6. These sections were replaced with language rendering the (continued...)

The trial court found and applied the following enhancement factors to the defendant's attempted aggravated arson conviction: (2) a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (4) the offense involved more than one victim; (9) a previous history of non-compliance with conditions of release into the community; and (10) possession or employment of a deadly weapon, firearm, or explosive device. *See* Tenn. Code Ann. § 40-35-114(2), (4), (9), (10) (2003).[3] The trial court found and applied the following enhancement factors to the defendant's aggravated assault conviction: (2) a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and (9) a previous history of non-compliance with conditions of release into the community. *See id*. § 40-35-114(2), (9). In mitigation, the trial court considered the defendant's record of employment and good character references. In weighing the factors, the trial court made a finding that enhancing factors outweigh the mitigating factors, supporting a 12-year sentence for the attempted aggravated arson and a six-year sentence for the aggravated assault.

As we understand the defendant's length-of-sentence complaint, he advocates de novo review with no presumption of correctness because the trial court began the sentencing calculations at incorrect points within the ranges. He also contests the applicability of enhancement factors (4), (9), and (10). Finally, he relies on the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), as invalidating the trial court's application of enhancement factors other than prior criminal convictions.

The Tennessee Supreme Court's decision in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), disposes of the defendant's *Blakely* argument. In *Gomez*, the court determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury or admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with the holdings of *Blakely*, *United States v. Booker*, 543 U.S. 220 (2005), or *United States v. FanFan*, the case consolidated with

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[2](...continued)
enhancement factors advisory only and abandoning a statutory minimum sentence. *See* Tenn. Code Ann. §§ 40-35-114 (2005) ("the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"), -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines.").

[3] Tennessee Code Annotated section 40-35-114, as amended in 2002 by Public Act 849, § 2(c), effective July 4, 2002, added one enhancement factor and subsequently renumbered all of the original enhancement factors in the statute. Thus, for the time period during which the defendant's offenses were committed and during which he was sentenced, the enhancement factor pertaining to previous criminal history was subsection (2), the enhancement factor for the offense involving more than one victim was subsection (4), the enhancement factor for a previous history of unwillingness to comply with the conditions of a sentence involving release in the community was subsection (9), and the enhancement factor for possession or employment of an explosive device or other deadly weapon during the commission of the offense was subsection (10). *See* Tenn.Code Ann. § 40-35-114(2), (4), (9), (10) (2003). We note that the legislature has, again, recently amended and renumbered the enhancement factors, *see* Tenn. Code Ann. § 40-35-114 (Supp. 2005), but these changes became effective for criminal offenses committed on or after June 7, 2005, and do not apply in this case.

*Booke*r. The *Gomez* court explained that "[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Gomez*, 163 S.W.3d at 661. As a result, *Blakely* does not avail the defendant in this case.[4]

The state never directly addresses the defendant's claim that enhancement factor (4) does not apply in this case. The defendant argues that the enhancement for an offense involving more than one victim is not appropriate because no one was injured, killed, or had property destroyed by his actions. We agree, although we note that Mr. Smith was injured. A "victim," under enhancement factor (4), is limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime. *See State v. Keathly*, 145 S.W.3d 123, 129 (Tenn. Crim. App. 2003); *State v. Cowan*, 46 S.W.3d 227, 236-37 (Tenn. Crim. App. 2000); *State v. Raines*, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). Other than Mr. Smith's injuries, the record discloses no qualifying injuries or property destruction. Thus, we conclude that this enhancement factor should not have been applied to the attempted aggravated arson conviction.

The trial court's application of enhancement factor (10) in this case is problematic. Factor (10) addresses a defendant's possession or employment of a firearm, explosive device or other deadly weapon during the commission of the offense. In *State v. Richard A. Nimro*, No. 03-C01-9207-CR-00232 (Tenn. Crim. App., Knoxville, June 4, 1993), the court ruled, "Use of an explosive device is an element of the offense of arson and may not enhance the punishment." *Id*., slip op. at 7. Similarly, in *State v. Ronald D. Blair*, No. 01C01-9406-CR-00191 (Tenn. Crim. App., Nashville, Dec. 22, 1994), the trial court had enhanced the defendant's arson sentence because fire was used during the commission of the offense; on appeal, the court reversed and held, "Because the use of fire is an element of the offense of arson, the trial court improperly applied this enhancing factor." *Id*., slip op. at 5. More recently, however, in *State v. Barry Waters Rogers*, No. M1999-01358-CCA-R3-CD (Tenn. Crim. App., Nashville, Sept. 15, 2000), the court ruled that "[p]ossession of an explosive was not an element of the crime of facilitation of arson and, thus, was properly applied as an enhancement factor." *Id*., slip op. at 7 (defendant testified that the rag, tape, and hatchet used to make the Molotov cocktail were already in his truck). In our opinion, *Ronald D. Blair* and *Richard A. Nimro* represent the better view of enhancement factor (10) in the context of arson-type convictions. Nevertheless, even should factor (10) properly be applied, we would afford negligible sentencing enhancement weight to it under the circumstances of this case.

As for enhancement factor (9), we again agree with the defendant that the factor should not have been applied. Pursuant to this factor, an offender's sentence may be enhanced if the defendant has shown a previous unwillingness "to comply with the conditions of a sentence involving

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[4] In its brief, the state predicts that the United States Supreme Court will ultimately reject the reasoning of *Gomez*; accordingly, the state urges harmless error in connection with application of enhancement factors not involving the defendant's prior convictions.

release in the community." Tenn. Code Ann. § 40-35-114(9) (2003). The presentence investigation report in this case indicates that on April 16, 2002, the defendant was placed on six months' probation for misdemeanor, resisting arrest-type offenses. The present offenses were committed on July 28, 2002, while the defendant was on probation; however, factor (9) may not be applied on that basis because current offenses ordinarily may not be used to establish a *previous* history of probation violation, under this factor. *State v. Brandon Ronald Crabtree*, No. M2002-01470-CCA-R3-CD (Tenn. Crim. App., Nashville, May 30, 2003); *State v. Hayes*, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995).[5]

The state relies on the commission of the instant offenses while the defendant was on probation, which as explained above does not apply. The state writes that the "presentence report indicates that the defendant committed several offenses while on probation." The state, however, does not identify the offenses, and the portion of the record to which the state cites is not the presentence report but, rather, a criminal history report that the state filed in the record. The state also refers to a conviction for assault on an officer while the defendant was on probation for DUI. For its part, the trial court relied on the defendant's arrest on September 22, 2001, on the resisting-arrest type offenses, when approximately four months earlier, he had been arrested for disorderly conduct, which resulted in a "6 month advisement - restraining order" on August 16, 2001.

The presentence report does reflect that the defendant was arrested on December 13, 1995, for DUI and that he pleaded guilty on January 11, 1996, for which he was sentenced to 11 months and 29 days, with all except 48 hours suspended, and placed on probation. Thereafter, he was arrested for misdemeanor assault on an officer on July 16, 1996, to which he entered an *Alford* plea and received probation. Even so, the report contains no evidence of any probation revocation in connection with the 1996 misdemeanor convictions. Furthermore, the disposition of the disorderly conduct conviction, to which the trial court referred, is insufficient to establish that the defendant was serving a sentence involving release into the community. The disposition noted, "6 month advisement - restraining order," indicates that the court took the matter under advisement for six months. From the evidence presented, we believe that the trial court erred in applying enhancement factor (9).

From the foregoing, we conclude that the trial court correctly applied enhancement factor (2) but misapplied enhancement factors (4), (9), and (10) to the attempted aggravated arson conviction, and it also erred in using the midpoint of the range as the presumptive starting point for calculating the sentence. The trial court correctly applied enhancement factor (2), but misapplied enhancement factor (9) to the aggravated assault conviction, and the record does not show that the trial court mistakenly used the midpoint of the range as a starting point for that sentencing calculation.

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[5] Although a sentence may be properly increased, pursuant to enhancement factor (14)(C), if a felony offense is committed while the offender is on probation for a prior felony conviction, the April 2002 probationary sentencing was for misdemeanor, not felony, convictions. *See* Tenn. Code Ann. § 40-35-114(14)(C) (2003) (felony was committed while on probation, if such probation is from a prior felony conviction). Hence, enhancement factor (14)(C) does not apply. *See State v. Jeffrey Lynn Culley*, No. M2003-01758-CCA-R3-CD (Tenn. Crim. App., Nashville, June 9, 2005).

Against this background, the trial court's sentencing determinations are not entitled to a presumption of correctness.

The record in this case certainly supports the application of enhancement factor (2) to the attempted aggravated arson conviction. The state urges that three other enhancement factors should apply: (5) a victim of the offense (Mr. Smith's father) was particularly vulnerable because of age or physical or mental disability, (11) no hesitation about committing a crime when the risk to human life was high, and (17) the crime was committed under circumstances under which the potential for bodily injury to a victim was great. *See generally State v. Winfield*, 23 S.W.3d 279, 283-84 (Tenn. 2000) (on de novo review, court may apply an enhancement factor not found by the trial court if the factor is appropriate for the offense and established by the record).

The trial court declined to apply enhancement factor (5) because although the state did show "that the elderly Mr. Smith was not in good health, it is not shown that he was any more vulnerable, under these circumstances, than the other victims." We respectfully disagree. Mr. Smith's particular vulnerability did not relate solely to his advanced age. *See State v. Lewis*, 44 S.W.3d 501, 505 (Tenn. 2001) (state required to proffer evidence in addition to victim's age to establish particular vulnerability, but that evidence need not be extensive). Chris Smith testified at trial that his father was in poor health and required constant oxygen. Chris Smith related that on the evening in question, he assisted in getting his father into bed, checked that his father had taken his required medications, supervised his father's breathing treatment, and then "hook[ed] him up to his oxygen." To be sure, a fire would have endangered anyone inside the trailer, but Mr. Smith's father was severely disadvantaged in resorting to any self-help in escaping from the trailer, and his use of medical oxygen would have significantly accelerated the combustion rate and reaction of the kerosene.

As for enhancement factor (11), the trial court merely commented that it was inherent in the offense of attempted aggravated arson and under the facts would not apply. However, in *Lewis*, the supreme court ruled that the high risk to human life enhancement factor may appropriately be applied to a conviction for aggravated arson when there are multiple victims involved. The court reasoned that because it takes only a single individual in a structure to elevate arson to aggravated arson, evidence that "more than one life was at risk 'demonstrates a culpability distinct from and appreciably greater than that incident to the offense for which [the defendant] was convicted.'" *Id.*, 44 S.W.3d at 507 (quoting *State v. Jones*, 883 S.W.2d 597, 603 (Tenn. 1994)). Here, there was proof that the defendant's attempted aggravated arson endangered the lives of Chris Smith and Joyce Lane-Smith and of Chris Smith's father, and whatever might be argued regarding Chris Smith's presence inside the trailer, the evidence is undisputed that Ms. Lane-Smith and Chris Smith's father were inside the trailer such that enhancement factor (11) was appropriate in this case.

The potential for bodily injury enhancement factor (17) has been held inappropriate to enhance a sentence for aggravated arson because a potential for bodily injury is inherent in the offense. *See State v. Alfred Eugene Bradley*, No. E2002-02840-CCA-R3-CD, slip op. at 15 (Tenn. Crim. App., Knoxville, Feb. 5, 2004); *State v. Kerwin L. Walton*, No. 02C01-9512-CR-00372, slip

op. at 4 (Tenn. Crim. App., Jackson, Sept. 17, 1997); *State v. Robert Gene Malone*, No. 03-C-01-9110-CR-00307, slip op. at 9 (Tenn. Crim. App., Knoxville, Mar. 31, 1992). Therefore, we decline to apply that factor to the defendant's attempted aggravated arson sentence.

The defendant stands convicted of attempted aggravated arson, a Class B felony offense. He qualifies as a Range I standard offender, thereby facing a sentencing range of a minimum of eight years and a maximum of 12 years. The record supports application of enhancement factors (2), (5), and (11). We assign moderate weight to enhancement factor (2) and considerable weight to factors (5) and (11). As did the trial court, we acknowledge, but assign little weight to, the defendant's employment record and good character references, such that in our view the enhancing factors far outweigh any mitigating considerations. Beginning at the minimum sentence of eight years, we are persuaded that the enhancement factors justify setting the sentence three years above the minimum but that no reduction is warranted based on the de minimus mitigating factors, for an effective sentence of 11 years.

The defendant's aggravated assault conviction is a Class C felony, and as a Range I standard offender, the defendant is facing a sentencing range of a minimum of three years and a maximum of six years. The record supports application of enhancement factor (2) to that conviction and justifies setting the sentence two years above the minimum, with no reduction for mitigating factors, for an effective sentence of five years.

The defendant also argues that the trial court erred in ordering the sentences for attempted aggravated arson and aggravated assault to run consecutively on the basis that he was a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high. *See* Tenn. Code Ann. § 40-35-115(b)(4) (2003). The state responds that at least three different criteria for consecutive alignment of sentences were satisfied in this case. As we shall explain, consecutive sentencing was warranted in this case.

When a defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115. They are:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct

> has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b) (2003). The existence of a single category is sufficient to warrant the imposition of consecutive sentences, *see State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997), and indeed, "[e]xtensive criminal history alone will support consecutive sentencing," *id*. In *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing when the "dangerous offender" category is used; the court must find consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. *Wilkerson*, at 937-39; *see State v. Imfeld*, 70 S.W.3d 698, 707-08 (Tenn. 2002).

In this case, the first basis for consecutive alignment of sentences is criterion (b)(6) that the defendant is sentenced for an offense committed while on probation. Previously, in connection with analyzing sentence-length enhancing factors, we pointed out that the defendant's criminal history reflects that at the time of the commission of the instant offenses he was on six-months' probation resulting from several misdemeanor convictions. The language in the enhancement-factors statute restricts consideration to probation resulting from felony convictions. *See* Tenn. Code Ann. § 40-35-114(14) (2003). No similar restriction exists for imposition of consecutive sentences, and commission of a current offense while on probation for a misdemeanor offense is sufficient to support an order of consecutive sentences. *See State v. Jason Curtis Johnson*, No. M2003-03060-CCA-R3-CD, slip op. at 20 (Tenn. Crim. App., Nashville, Feb. 17, 2006); *State v. Vidal L. Strickland*, No. M2002-01714-CCA-R3-CD, slip op. at 17 (Tenn. Crim. App., Nashville, Sept. 30, 2003).

The second basis for consecutive alignment of sentences is criterion (b)(2) that the defendant is an offender whose record of criminal activity is extensive. Until the instant offenses, the defendant had no felony convictions. His criminal record, however, is replete with alcohol-related and assault-type offenses. In fact, the presentence investigator recommended that if probation was a consideration, the defendant should undergo a mental health evaluation and an alcohol/drug evaluation. Moreover, the trial court expressed the following concern, which we consider justified, about a previous episode:

> [In an April 1997 warrant the] affidavit alleges that he had made harassing phone calls and threats to his ex-wife, Angela Stallings, and made direct threats to kill Daniel Allen Blankenship, who was engaged to Angela Stallings. It's almost a carbon copy of the facts in this case. And that was back in 1997. Shows a patterned history of behavior and threats of violence.

The record in this case consequently supports the imposition of consecutive sentences in light of his extensive criminal history. *See State v. Nathaniel Robinson, Jr.*, No. E2004-02191-CCA-R3-CD (Tenn. Crim. App., Knoxville, Sept. 19, 2005) (consecutive sentencing authorized even though all of the defendant's prior convictions were misdemeanors; court noted that defendant's record shows a bent toward committing the same types of offenses that currently bring him before the court), *perm. app. denied* (Tenn. 2006).

The last basis for consecutive alignment of the defendant's sentences is the "dangerous offender" criterion set forth in subsection (b)(3). The trial court made specific factual findings; it found that the aggregate length of the sentence reasonably relates to the severity of the crimes for which the defendant stands convicted and that the defendant's past violent behavior, including death threats, necessitates extended confinement to protect society. Those findings are supported by the record and will not be disturbed on appeal.

From the foregoing and based on our de novo review, without a presumption of correctness, we conclude that application of enhancement factors (2), (5), and (11) to the attempted aggravated arson conviction warrants a sentenced of 11 years and that application of enhancement factor (2) to the aggravated assault conviction justifies a sentence of five years. These sentences shall be served consecutively.

VII. CONCLUSION

In summary, we hold that the trial evidence was sufficient to support each of the defendant's convictions. We also hold that any error in the admission or exclusion of evidence was harmless and did not rise to the level of plain error. Likewise, any instructional error did not meet the requirements of plain error. Finally, with respect to sentencing, we modify the length of the defendant's attempted aggravated arson conviction from 12 years to 11 years and modify the length of the aggravated assault conviction from six to five years, with the defendant classified as a Range

I standard offender. Finding that consecutive sentencing is warranted in this case, we also order that the defendant's felony convictions shall be served consecutively for an effective sentence of 16 years.

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JAMES CURWOOD WITT, JR., JUDGE